No. 85-6790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO E. GRANBERRY,
Petitioner,

v.

JIM W. GREER, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

JOINT APPENDIX

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(appointed by this Court)
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Carbondale, Illinois 62901
(618) 536-4423
Attorney for Petitioner

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(Counsel of Record)

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PETITION FOR CERTIORARI FILED APRIL 22, 1986
CERTIORARI GRANTED OCTOBER 6, 1986

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
Aug. 10	1	PETITION for Writ of Habeas Corpus
	2	Supporting MEMORANDUM for Petition by Petitioner.
Aug. 12	3	ORDER
Aug. 31	5	MOTION to Dismiss by Respondent.
	6	BRIEF in Support of Motion to Dismiss by Respondent.
Sept. 8	8	RESPONSE to Motion to Dismiss by Petitioner
1984		
Mar. 26	9	REPORT & RECOMMENDATION
Apr. 6	10	OBJECTION to Magistrate's Report and Recommendation
Apr. 18	11	MEMORANDUM & ORDER (JLF) adopting Mag. Cohn's R & R that Respondent's Mot to Dis be granted. This action is DISMISSED.
Apr. 20		CASE CLOSED
May 17	12	NOTICE of Appeal by Petitioner.
May 31	13	ORDER that Petitioner's Mot for a Certificate of Probable Cause is Denied.
May 30	14	MOTION for a Certificate of Probable Cause
June 11		Appeal docketed in USCA and assigned No. 84-1956
1986		
Apr. 14	15	ORDER (USCA) that judgment of District Court is REMANDED in accordance with the opinion of this court. DATED: 12/26/85

DATE	NR.	PROCEEDINGS
	16	ORDER (USCA) that Petition for rehearing is DENIED. DATED: 02/28/86
Apr. 14		JS#5 reopening case X820 Index
Apr 16	17	ORDER (JLF) that Order of Crt of 5/31/84 is vacated & set aside & that the Petn filed on 08/10/83 is DISMISSED for failure to exhaust state remedies. DATED 04/16/86.
Apr 17		CASE CLOSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FORM FOR USE IN APPLICATIONS FOR
HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name WALDO E. GRANBERRY

Prison Number C-6422

Place of Confinement Vienna Correctional Center,
Vienna, Illinois 62995

United States District Court
Southern District of Illinois

Case No. 83-3235

WALDO E. GRANBERRY, PETITIONER

vs.

LARRY MIZELL, Warden, RESPONDENT

and

THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
ADDITIONAL RESPONDENT

(Instructions Omitted)

PETITION

1. Name and location of court which entered judgment of conviction under attack Criminal Court of Cook County, Chicago, Illinois
2. Date of judgment of conviction June 22, 1960

3. Length of sentence concurrent 99 yrs, life, 1-life Sentencing Judge Alfred Cilella

4. Nature of offense or offenses for which you were convicted murder, rape, armed robbery

5. What was your plea? (Check one)

   (a) Not Guilty ( )
   (b) Guilty (X)
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment and a not guilty plea to another count or indictment, give details ———————

6. Kind of Trial: (check one)

   (a) Jury ( )
   (b) Judge only (X)

7. Did you testify at trial? (Yes ( ) No (X)

8. Did you appeal from the judgment of conviction?
   Yes ( ) No (X)

9. If you did appeal, answer the following:

   (a) Name of Court
   (b) Result
   (c) Date of Result

   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: ———————

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes (X) No ( )

11. If your answer to 10 was "yes, give the following information:

    (a) (1) Name of Court Criminal Court of Cook County
    (2) Nature of Proceeding Post-Conviction
    (3) Grounds raised involuntary plea of guilty
    See: *People v. Granberry*, 45 Ill. 2d 11, 256 N.E. 2d 830 (1970)
    (4) Did you receive an evidentiary hearing on your petition, application or Motion?
    Yes ( ) No (X)
    (5) Result denied
    (6) Date of Result 3-24-70

    (b) As to any second petition, application or motion give the same information:

    (1) Name of Court Illinois Supreme Court
    (2) Nature of proceeding Mandamus petition
    (3) Grounds raised Violation of the Ex Post Facto Clause in parole denial
    Long et al (Granberry) v. Irving et al, # 7023
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes( ) No (X)
    (5) Result denied without prejudice
    (6) Date of result 10-26-81

    (c) As to any third petition, application or motion, give the same information:

    (1) Name of Court Illinois Supreme Court
    (2) Nature of proceeding Mandumus petition
    (3) Grounds raised Unlawful denial of parole for same rationale condemned in *Ware v. Kaufman*, # 80C3209 (N.D. Ill. 6-3-82) *Granberry v. Illinois Prison Review Board*, # 7145

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No (X)
(5) Result denied
(6) Date of result 4-13-83

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First Petition, etc. YES (X) NO ( )
(2) Second petition, etc. YES (X) NO ( )
(3) Third petition, etc. YES (X) NO ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: ———

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

(Instructions Omitted)

A. Ground one: Denied parole contrary to statutory directive (Due Process) and in violation of the F Post Facto Clause

Supporting FACTS (tell your story *briefly* without citing cases or law): Granberry was consistently denied parole since 1971 despite the parole board's administrative decisions that he was not a "substantial risk" and his prison behavior warranted parole. The Board retroactively applied the general deterrence paroling criterion to deny parole until *Welsh v. Mizell* when the Board began switching rationales, capriciously and arbitrarily. The last parole denial rationale was in the "best interest of society" which, in the context of prior denials, is a re-phrasing of the prohibited general deterrence parole criterion in this case.

(No additional "Grounds" Enumerated in Petition)

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: ———

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? YES ( ) NO (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attached herein:

(a) At preliminary hearing James Douherty, public defender of Cook County, Chicago, Illinois
(b) At arraignment and plea same
(c) At trial same
(d) At sentencing same
(e) On appeal
(f) In any post-conviction proceeding James Dougherty, P.D., Chicago
(g) On appeal from any adverse ruling in a post-conviction proceeding Edmund W. Kitch, appellate defender, Chicago

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
YES (X) NO ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? YES ( ) NO (X)

(a) If so, give name and location of court which imposed sentence to be served in the future:
(b) And give date and length of sentence to be served in the future:
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
YES ( ) NO ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 8, 1983

/s/ Waldo E. Granberry
(Signature)

(Signature of Attorney)
if any

[SEAL]

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
Springfield
62706

April 13, 1983

JULEANN HORNYAK
CLERK

Telephone
Area Code 819
782-2039

Mr. Waldo Granberry
Reg. No. C-6422
Box 1000
Vienna, IL 62995

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 7145—People ex rel. Waldo Granberry, petitioner vs. Illinois Prison Review Board, respondent.

The portion of the motion by petitioner for leave to file a petition for writ of *mandamus* and for appointment of counsel is denied. The part of the motion for leave to sue as a poor person is allowed.

JULEANN HORNYAK
Clerk

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
Springfield
62706

October 30, 1981

Mr. Robert Long
Reg. No. C-10357
Box 100
Vienna, IL 62995

In re: People ex rel. Robert Long, et al., petitioners, vs. James Irving, Chairman, et al., respondents. No. 7023

Dear Mr. Long:

The Supreme Court on October 21, 1981, made the following announcement concerning the above entitled cause:

The motion by respondents for leave to cite supplemental authority is allowed.

The motion by petitioners for leave to file a petition for an original writ of mandamus is denied without prejudice to proceeding in any appropriate circuit court for consideration of the question presented; *Harris v. Irving* (1980) 90 Ill. App. 3d 56, Leave to appeal denied January 30, 1981, No. 54264; and *Weaver v. Graham* (February 24, 1981), 28 Crl 3077, 450 U.S. ——, 101 S. Ct. 960.

It is unnecessary to consider the motion by petitioners for appointment of counsel.

Very truly yours,

Clerk of the Supreme Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 83-3235

WALDO E. GRANBERRY, PETITIONER,

vs.

LARRY MIZELL, Warden, RESPONDENT.

ORDER

Respondent(s) shall, within twenty-three (23) days of receipt of this application for writ of habeas corpus, answer and show cause why the writ should not issue.

Service upon the Attorney General, State of Illinois, 500 S. Second Street, Springfield, Illinois 62706, shall constitute sufficient service.

ENTERED this 11th day of August, 1983.

/s/ Gerald B. Cohn
GERALD B. COHN
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

[Title Omitted in Printing]

MOTION TO DISMISS

Respondent, by his attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, moves this Court for an order dismissing the above-referenced cause because it fails to state a claim upon which relief may be granted. Rule 12(b)(6) Federal Rules of Civil Procedure.

A brief in support of this motion is attached.

WHEREFORE, for the reasons more fully explained in the brief attached hereto and incorporated herein, respondent respectfully moves that this Court dismiss the instant petition.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

By: /s/ Rober Huebner
ROGER HUEBNER
Assistant Attorney General
500 South Second Street
Springfield, IL 62706
(217) 782-1090

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

[Title Omitted in Printing]

BRIEF IN SUPPORT OF MOTION TO DISMISS

Respondent submits this brief in support of his motion.

The petitioner, Waldo Granberry, is presently incarcerated at the Vienna Correctional Center, Vienna, Illinois.

In 1960, petitioner entered guilty pleas to the following offenses and the Circuit Court of Cook County imposed the following sentences, respectively: murder, 99 years; armed robbery, 1 year to life; robbery, 1 year to life; rape, life; rape, life; armed robbery, 1 year to life; and armed robbery, 1 year to life.

Petitioner filed a post-conviction petition in Cook County alleging his plea of guilty was involuntary. The circuit court denied the petition. He appealed that decision to the Illinois Supreme Court. The Supreme Court affirmed the denial, *People v. Granberry*, 45 Ill.2d 11 (1970). Petitioner has filed two petitions for writ of certiorari in the Illinois Supreme Court. Both were denied.

Petitioner has filed the instant habeas corpus petition pursuant to 28 U.S.C. § 2254. Petitioner alleges his denial of parole was in violation of due process and the ex post facto clause of the United States Constitution. In December, 1982, pursuant to *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1981), petitioner was given a new parole hearing. That hearing was continued to January 26, 1983. In January, 1983, his application for parole was denied. In March, 1983, petitioner had another

parole hearing resulting in denial of parole on March 10, 1983.

I. *EX POST FACTO ALLEGATION*

The ex post facto clause prohibits enactment of any law which punishes an act not punishable at the time of its commission or enhances the punishment originally prescribed. *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

The court in *United States ex rel. King v. McGinnis*, 558 F.Supp. 1343, 1345 (N.D.Ill.1983) dealt with the exact contention before this Court. In *United States ex rel. King v. McGinnis*, the court stated:

> In the case at bar, petitioner relies on *Welsh*, *supra*, to support his ex post facto claim. The *Welsh* court held that a prisoner who committed his offenses prior to 1973 could not be denied parole solely on the ground that "release would deprecate the seriousness of the offense." The court found that this criterion, Ill. Rev. Stat. ch. 38, § 1003-3-5(c)(2), enacted in 1973, imported a new factor of general deterrence into the parole release process. *Welsh*, 668 F.2d at 331. Prior to 1973, Illinois law applied special deterrence criteria to parole decisions. This approach focused on the individual, giving significant weight to his behavior while incarcerated and his prospects for rehabilitation. The *Welsh* court reasoned that the parole board's reliance on the new seriousness-of-the-offense criterion as the sole basis for the denial af parole to prisoners convicted before 1973 constituted an after-the-fact enhancement of punishment. *Welsh*, 668 F.2d at 331. Citing the *Weaver* test, *Welsh* concluded that retroactive application of the new general deterrence standard disadvantaged the petitioner, resulting in an ex post facto violation. *Id.*

In light of the foregoing, petitioner's ex post facto allegation must be dismissed. He was not denied parole based on general deterrence criteria. The Prisoner Review Board stated its reasons for denying petitioner parole as follows:

> The Prisoner Review Board in considering your particular case for the possibility of parole noted many factors which include but are not limited to your personal interview, a thorough perusal of your file, the fact that you are serving sentences of 99 years for murder, life for rape (2) and 1-life for armed robbery (4) all crimes involving an assaultive nature against the person.
>
> Your educational achievements and successful participation in various programs are noted and you are encouraged to continue in the same vein.
>
> However, given the period in your life when your gross aberrant behaviour was manifested in such an aggressive manner, the Board feels that release at this time would not be in the best interest of society.
>
> Accordingly, we deny.

It is clear from a reading of the Prisoner Review Board's rationale that they relied on special deterrence criteria not general deterrence criteria as claimed by petitioner. The Board's decision notes petitioner's institutional record, his educational achievements and the nature of the offenses committed and doubt as to his ability to change his behavior from the aggressive manner once displayed.

There is no support in this rationale for the claim that the Board considered these facts with a view toward deterring society in general from committing similar crimes. Therefore, the denial of petitioner's parole request, properly evaluated by special deterrence criteria, does not violate the ex post facto clause. See also, *Walker v. Prisoner Review Board*, 694 F.2d 499

(7th Cir. 1982); *United States ex rel. King v. McGinnis, supra; United States ex rel. Burton v. Klincar*, No. 82 C 7340 (N.D.Ill.Feb. 7, 1983).

II. *DUE PROCESS ALLEGATION*

Petitioner next contends that his denial of parole was in violation of due process.

To determine whether a statement of reasons for denial of parole was constitutionally adequate, the court in *United States ex rel. Scott v. Illinois Parole and Pardon Board*, 669 F.2d 1185, 1190 (7th Cir. 1982), affirmed the test adopted in *United States ex rel. Richardson v. Wolff*, 525 F.2d 797 (7th Cir. 1975). That test, taken from the court's opinion in *United States ex rel. Johnson v. Chairman of New York State Board of Parole*, 500 F.2d 925 (2nd Cir.), was described as follows:

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based.

Scott, 669 F.2d at 1191 (quoting *Johnson*). The *Scott* court, citing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 200 (1979), further stated that due process does not require the parole board to specify the particular evidence on which it relies. *Scott*, 669 F.2d at 1191.

In the instant case, as previously quoted for the Prisoner Review Board's rationale, petitioner was given an adequate explanation as to the denial of his parole. Respondent submits that this explanation is sufficient to

satisfy the Scott requirement. See *Walker v. Prison Review Board, supra.*

Petitioner's allegation that contractually his parole should be judged by the specific deterrence criteria has been met. As discussed in section one, his parole denial was based on specific deterrence criteria. Thus, this due process claim is clearly without merit and should be dismissed.

Therefore, for the foregoing reasons, respondent respectfully moves that this Court dismiss petitioners' petition for writ of habeas corpus.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

By: /s/ Roger Huebner
ROGER HUEBNER
Assistant Attorney General
500 South Second Street
Springfield, IL 62706
(217) 782-1090

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

REPORT AND RECOMMENDATION

Before the court is Mr. Granberry's Petition for a Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254. He alleges that his denial of parole violated his right to due process of law and the ex post facto clause of the United States Constitution.

The respondent then filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The petitioner then filed a "Response to Motion to Dismiss."

The undersigned United States Magistrate has reviewed these pleadings and motions, as well as the applicable law, and now respectfully submits this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

* * * *

The petitioner, Mr. Granberry, is an inmate at the Vienna Correctional Center. In a well-written literate Petition, Mr. Granberry first notes that in Cook County, in 1960, he received concurrent sentences of 99 years, one-to-life, and life for murder, rape and armed robbery. In the instant petition, he raises one claim: that

> [t]he Board retroactively applied the general deterrence paroling criterion to deny parole until *Welsh v. Mizell*, when the Board began switching rationales, capriciously and arbitrarily. The last parole denial rationale was in the "best interest of society" which, in the context of prior denials, is a re-phrasing of the prohibited general deterrence parole criterion in this case.

Thus, in sum, petitioner argues that *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1981) forbids the utilization of general deterrence criteria in considering the parole request of an inmate who committed his crime prior to 1973.

Subsequent to the filing of the instant petition, however, the Court of Appeals has reversed its earlier *Welsh* decision on this point. *Heirens v. Mizell*, No. 83-1748, United States Court of Appeals for the Seventh Circuit (decided February 24, 1984). The *Heirens*' court stated: "[w]e hold that prior to 1973 the Parole Board possessed broad discretion that allowed it to consider both principles of retributive justice and general deterrence in its parole decisions." *Id.* at p. 18.

The petitioner was denied parole by way of a "Rationale" dated March 10, 1983. [See petitioner's Exhibit 7-N]. The Board concludes that "given the period in your life when your gross aberrent behavior was manifested in such an aggressive manner, the Board feels that release at this time would not be in the best interests of society." The Board also stressed the seriousness of the petitioner's crimes, noting that "all crimes involve[d] an assaultive nature against the person."

This Rationale is constitutionally adequate. We have already referred to the recent *Heirens* decision above. In addition, the Seventh Circuit has also recently held that "it is permissible to consider the relationship of crimes committed to the likelihood of rehabilitation." *Sayles v. Welborn*, United States Court of Appeals for the Seventh Circuit, No. 83-1346 (decided January 11, 1984) (at p. 5).

As the *Heirens*' court noted, "the extent of judicial review of the Parole Board's decision is very narrow. If the Parole Board cites to facts upon which its reasons for denial of parole can be justified, due process is met."

Heirens at p. 33. Clearly, the Board has done this in the instant case.

We agree with the various prison officials and others who have commended Mr. Granberry for his exemplary record while incarcerated. Nonetheless, we must recommend deferrence to the decision of the respondents in this case.

Therefore, for the reasons stated above, it is respectfully recommended that Mr. Granberry's Petition be denied.

Dated this 26th day of March, 1984.

/s/ Gerald B. Cohn
GERALD B. COHN
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

Before the Court is a Report and Recommendation of United States Magistrate Gerald B. Cohn that respondent's Motion to Dismiss be granted. Petitioner has filed an objection to this recommendation, and thus, pursuant to 28 U.S.C. § 636(b)(1)(C) this Court will make a de novo determination of those portions of the recommendation to which objections are made.

Mr. Granberry filed this petition pursuant to 28 U.S.C. § 2254 arguing that the parole board relied on the impermissible criteria of general deterrence when he was denied parole. Petitioner relies on *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982) where the Seventh Circuit held that the general deterrence criteria could not be utilized in cases where an inmate committed the crime prior to 1973. However, the Seventh Circuit reversed itself in *Heirens v. Mizell*, No. 83-1748 (Feb. 24, 1984) where the Court specifically held the parole board can utilize the general deterrence criteria to those inmates who committed crimes prior to 1973. While the Court is impressed with petitioner's efforts to discredit and distinguish *Heirens*, the Court finds these arguments to be without merit.

Accordingly, the Court hereby ADOPTS Magistrate's Cohn's recommendation that respondent's Motion to Dismiss be granted. This action is DISMISSED.

IT IS SO ORDERED.

DATED: April 18, 1984

/s/ James L. Foreman
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Waldo E. Granberry, petitioner above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order denying habeas corpus relief entered in this action on April 18, 1984.

Dated: May 14, 1984

/s/ Waldo E. Granberry
WALDO E. GRANBERRY, PRO SE
Reg. No. C-6422
Box 100
Vienna, Illinois 62995

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 26, 1985

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. KENNETH F. RIPPLE, Circuit Judge
Hon. WILBUR F. PELL, JR., Senior Circuit Judge

No. 84-1956

WALDO E. GRANBERRY, PETITIONER-APPELLANT,

vs.

LARRY MIZELL, RESPONDENT-APPELLEE.

Appeal from the United States District Court
for the Southern District of Illinois
East St. Louis Division

No. 83 C 3235—Judge James L. Foreman

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Southern District of Illinois, East St. Louis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REMANDED, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-1956

WALDO E. GRANBERRY, PETITIONER-APPELLANT

v.

LARRY MIZELL, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Illinois
East St. Louis Division
No. 83 C 3235—James L. Foreman, *Chief Judge*

Argued November 12, 1985—Decided December 26, 1985

Before CUMMINGS, *Chief Judge*, RIPPLE, *Circuit Judge*, and PELL, *Senior Circuit Judge*.

CUMMINGS, *Chief Judge*. Waldo E. Granberry appeals from the district court's denial of his petition for a writ of habeas corpus. He argues that this Court should issue the writ for either of two reasons. First, he claims that the parole criteria that allegedly are being used to deny him parole violate the *ex post facto* clause because the criteria were enacted by the Illinois legislature long after he was sentenced to prison. Second, he asserts that the Illinois Parole Board has acted in such an arbitrary manner as to violate his due process rights. Aside from contesting appellant's claims on the merits, the Illinois

Attorney General asserts for the first time on appeal that appellant has failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b). Appellant counters that in *Heirens v. Mizell*, 729 F.2d 449 (7th Cir.), *certiorari denied*, 105 S. Ct. 147 (1984), this Court, confronting an essentially similar situation, reached the merits after stating that "in any event, respondents have waived any argument regarding exhaustion since they failed to raise this issue in the proceedings before the district court." *Id.* at 457. The statement appellant cites, however, was clearly dictum. It was made only after this Court had specifically found that the petitioner there had in fact exhausted his state remedies when the Illinois appellate court addressed the merits of his *ex post facto* claim. *Id.* In any case, to the extent that *Heirens* can be read as suggesting that the exhaustion requirement may be waived by the failure to assert it in the district court, we disassociate ourselves from that view.

In *United States ex rel. Lockett v. Illinois Parole and Pardon Bd.*, 600 F.2d 116 (7th Cir. 1979), we decided a case in which the state had failed to raise the exhaustion issue either in the district court or in the briefs on appeal. The state raised the issue for the first time at oral argument. Nonetheless, after reviewing the various approaches to the waiver question used by other circuits, we held that there was no bar to our raising the exhaustion issue on our own and remanded the case to the district court with instructions to dismiss for failure to exhaust state remedies. *Id.* at 118.

Subsequent developments have supported the holding in *Lockett* that there is no bar to raising the exhaustion issue *sua sponte*. In fact, in *Mattes v. Gagnon*, 700 F.2d 1096 (7th Cir. 1983), this Court stated that *Rose v. Lundy*, 455 U.S. 509 (1982), which held that a district court must dismiss petitions containing both exhausted and unexhausted claims, not only allowed us to consider the exhaustion issue *sua sponte*, but actually required us to consider the issue *sua sponte*. 700 F.2d at 1098 n.1.

Cases in other circuits support that position. The Tenth Circuit in *Naranjo v. Ricketts*, 696 F.2d 83 (1982), held that because the exhaustion requirement serves the interest of the state courts, it could not be waived by the state prosecutor. Similarly, in *Bowen v. State of Tennessee*, 698 F.2d 241 (1983) (en banc), the Sixth Circuit held that in light of the Supreme Court's emphasis in *Rose v. Lundy*, 455 U.S. 509 (1982), on "the state *courts*' role in the enforcement of the federal law," 698 F.2d at 243 (emphasis in original), the exhaustion rule could not be waived or conceded in the district court and could be noticed *sua sponte* on appeal. The Sixth Circuit subsequently held that although a state had initially opted not to argue exhaustion on appeal, the court not only could consider the exhaustion issue, but was obligated to do so. *See Parker v. Rose*, 728 F.2d 392, 394 (1984). The Ninth Circuit has also held that the district court and a court of appeals may examine the exhaustion question *sua sponte*. *Batchelor v. Cupp*, 693 F.2d 859, 862 (1982) (citing *Campbell v. Christ*, 647 F.2d 956, 957 (9th Cir. 1981)), *certiorari denied*, 463 U.S. 1212 (1983). The First Circuit in *Dickerson v. Walsh*, 750 F.2d 150 (1984), held that the petitioner had not exhausted his state remedies even though Massachusetts had conceded exhaustion in the district court.

The rule in the Fifth and Eleventh Circuits is that the state may waive the exhaustion requirements. *See McGee v. Estelle*, 722 F.2d 1206 (1984); *Thompson v. Wainwright*, 714 F.2d 1495 (1983), *certiorari denied*, 104 S. Ct. 2180 (1984); *see also Purnell v. Missouri Department of Corrections*, 753 F.2d 703, 708-10 (8th Cir. 1985) (following *McGee* and *Thompson*). Those courts allow waiver to occur when the state fails to raise the issue at the proper time. However, they qualify their holdings by allowing an appellate or district court to reject the state's waiver and notice *sua sponte* the lack of exhaustion. *See McGee*, 722 F.2d at 1214; *Thompson*, 714 F.2d at 1509. The rule in those circuits has not

gone without criticism. *See Darden v. Wainwright*, 725 F.2d 1526, 1533-44 (11th Cir. 1984) (en banc) (Tjoflat, J., dissenting). In any event, to the extent that the approach used in those cases might be inconsistent with our holding today, we reject them.

We must now decide whether petitioner has exhausted his state remedies. In *United States ex rel. Johnson v. McGinnis*, 734 F.2d 1193 (7th Cir. 1984), the exhaustion issue was considered in a case in which the material facts were, with one exception, virtually identical to those presented here. We held there that the petitioner had failed to exhaust his state remedies for denial of parole because he had failed to seek a writ of mandamus in the Illinois courts. *Id.* at 1200. The only material difference in this case is that petitioner here did seek a writ of mandamus in the Illinois Supreme Court. That court denied the petitioner's motion "without prejudice to proceeding in any appropriate circuit court for consideration of the question presented." We hold that the petitioner's failure to seek a writ in the lower Illinois courts constitutes a failure to exhaust state remedies.[1] Because of this failure, the cause is remanded to the district court with instructions to dismiss for failure to exhaust state remedies.

A true Copy:

Teste:

/s/ Lupe Calderon, *Deputy*
Clerk of the United States Court of
Appeals for the Seventh Circuit

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[1] Pursuant to Circuit Rule 11, appellant's counsel has brought *Inglese v. United States Parole Commission*, 768 F.2d 932 (7th Cir. 1985), to our attention. In light of our disposition of this case, it is unnecessary for us to consider what impact, if any, that *Inglese* would have on the merits of this case.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 28, 1986

Before
HON. WALTER J. CUMMINGS, *Chief Judge*
HON. KENNETH F. RIPPLE, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Senior Circuit Judge*

No. 84-1956

WALDO E. GRANBERRY, PETITIONER-APPELLANT

vs.

LARRY MIZELL, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Illinois
East St. Louis Division

No. 83 C 3235—James L. Foreman, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioner-appellant, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judge Pell terminated his participation in this case as of December 31, 1985, and did not vote on the petition for rehearing.

SUPREME COURT OF THE UNITED STATES

No. 85-6790

WALDO E. GRANBERRY, PETITIONER

v.

JIM W. GREER, Warden

ORDER ALLOWING CERTIORARI

Filed October 6, 1986

The motion of petitioner for leave to proceed *in forma pauperis* and the petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

Justice Scalia took no part in the consideration or decision of this petition.